Petition

81-1491

Supreme Court
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ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO.

ESTHER KIPSHENBAUM

Petitioner,

v.

PENNSYLVANIA BOARD OF LAW EXAMINERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

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I. QUESTIONS PRESENTED FOR REVIEW

1. Does the Due Process Clause require a state to provide a graduate of a law school applying for the bar with the opportunity for a hearing on the issue of whether she received an adequate legal education when her law school was accredited shortly after she graduated?

2. Does the Due Process Clause allow a state to conclusively presume that a bar applicant received an adequate legal education, preventing her from taking the bar exam, when her law school was not accredited until after she graduated?

3. Does the Equal Protection Clause allow a state to deprive a person who graduated from a law school, which was not accredited at the time, of all opportunity to take its bar exam when it permits graduates of the same law school, who received their legal education at the same time as

petitioner, to take the bar when they artificially delayed the date of receipt of a law degree until after the school was accredited.

4. May a state, consistent with the Due Process Clause, retrospectively amend its bar admission rules to exclude an applicant from a law school which was not accredited on the date of her graduation, which law school later became accredited, when at the time petitioner entered law school, the state granted waivers of its accreditation requirement.

PARTIES WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

This petition seeks review of the judgment of the Pennsylvania Board of Bar Examiners and the Supreme Court of Pennsylvania.

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REPORTS OF DECISIONS

The Pennsylvania Board of Law Examiners denied petitioner's application to take the Pennsylvania bar examination on October 24, 1980. Their decision is not reported.

The Supreme Court of Pennsylvania denied a Petition for Review of the Board's decision on February 17, 1981. The Court also denied the Petition for Reconsideration of the Petition for Review on September 16, 1981. Neither decision is reported.

JURISDICTION

The Supreme Court of Pennsylvania denied a Petition for Review of the decision of the Board of Law Examiners on February 17, 1981, which was entered on February 20, 1981 and after granting a Petition for Reconsideration on March 11, 1981, which was entered on March 20, 1981, the Court subsequently denied the Petition for Review on Reconsideration on September 11, 1981, which was entered on September 16, 1981.

On application of petitioner for an extension of time, Justice Brennan signed an order on December 16, 1981 extending the time for filing a petition for a writ of certiorari in this matter to and including February 8, 1982.

The Court has jurisdiction to review the final judgment of the Supreme Court of Pennsylvania denying the petition for review of the decision of the Board of Bar Examiners pursuant to 28 U.S.C. §1257(3) since the validity of a state rule of the Pennsylvania Supreme Court is drawn in question on the ground of its being repugnant to the Fourteenth Amendment to the Constitution and since a right, privilege or immunity is claimed under the Constitution.

PROVISIONS INVOLVED

Fourteenth Amendment to the Constitution of the United States, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 203 of the Pennsylvania Bar Admission Rules:[1/]

> Admission of Graduates of Accredited Institutions
>
> (a) The general requirements for admission to the bar of this Commonwealth are:
>
> ...
>
> (2) Receipt without exception of an earned Bachelor

1/ This rule was amended on December 17, 1981 by the Pennsylvania Supreme Court to read as follows:

> Rule 203. Admission of Graduates of Accredited Institutions.
>
> (a) Bar examination. -- The general requirements for

> of Laws or Juris Doctor degree from an accredited law school. See Rule 205 (relating to admission of foreign attorneys) for standards applicable to graduates of foreign law schools.

STATEMENT OF THE CASE

Petitioner Esther Kirshenbaum attended the International School of Law (hereinafter "International") in Arlington, Virginia, one of many new law schools which were founded in the last ten years as the ranks of pro-

---

1/ (continued)

> permission to sit for the bar examination are:
>
> ...
>
> (2) Completion of the study of law at and receipt without exception of an earned Bachelor of Laws or Juris Doctor degree from an accredited law school. See Rule 205 (relating to admission of foreign attorneys) for standards applicable to graduates of foreign law schools.

spective law students swelled beyond prior levels. Petitioner began her legal education in September, 1974 and completed all courses satisfactorily by August, 1977. She was awarded a Juris Doctor degree in August, 1977 by International.

International was founded in 1972. It applied to the American Bar Association (ABA) for provisional accreditation shortly thereafter, and the first ABA inspection occurred in December, 1974. As of the time that petitioner graduated from International it had still not received ABA accreditation. According to the ABA report on International in May, 1977, the primary reasons for not granting accreditation were the reliance of the school on tuition income to finance operations, the lack of affiliation with an established university, and the perceived inadequacy of faculty salaries.

The law school was again reviewed by the ABA in May, 1978, but provisional accreditation was still withheld. The ABA again relied on the fact that the school continued to rely on tuition income to finance operations, it was not yet affiliated with an established university, and the faculty salaries and fringe benefits were inadequate. The ABA continued to strongly suggest to International, as it did to all new law schools, that accreditation would be forthcoming if it would affiliate with an established university thereby improving its financial position and its ability to assure repayment of loans necessary to fund operations in addition to the students' tuition.

Shortly thereafter International affiliated with George Mason University in Arlington, Virginia by merging into that University on July 1, 1979. From that time

International ceased to exist as a separate entity, and it was thereafter known as George Mason University School of Law (hereinafter "George Mason"). Prior to the merger, George Mason did not have a law school.

The ABA conducted a review of George Mason after the merger, and on August 6, 1980, George Mason, the successor to International, received provisional accreditation from the ABA. Thus, one year after the affiliation with George Mason, as the ABA had urged from the inception of their reviews, the ABA granted accreditation. The accreditation delay was thus mostly due to the financial position of International, which was remedied by merger, and it had little or anything to do with the quality or content of the legal education provided to petitioner and her classmates.

Petitioner filed an application to sit for the February, 1981 Pennsylvania bar examination on October 2, 1980. The Respondent Pennsylvania Board of Bar Examiners denied her application to sit for the bar exam on October 24, 1980 for the reason that, according to their interpretation of Pennsylvania Bar Admission Rule 203, petitioner had not graduated from a law school which at the time was accredited by the ABA. However, it is clear and undisputed that petitioner did graduate from a law school which after merger with a university was accredited, and it was accredited at the time that petitioner applied to take the bar exam.

The respondent Board never afforded petitioner the opportunity to submit any evidence concerning the circumstances surrounding the delay in accreditation of her law school. They have no procedure for a hearing process or even a provision for sub-

mission of written materials amplifying on the reasons for the delay in accreditation. According to the respondent Board, both the reasons for the delay in receipt of accreditation and the fact of the accreditation subsequent to petitioner's graduation were irrelevant to their determination of whether petitioner was eligible to sit for the bar exam. Rather, the Board adopted a wooden and inflexible interpretation of Rule 203 which barred anyone from taking the bar exam if their law school was not accredited at the time of their graduation.

Despite the respondent Board's treatment of petitioner's application, they responded very differently to the applications of sixteen other graduates of International-George Mason. Sixteen other graduates of the school applied to the respondent Board, all of whom formally graduated on August 23,

1980 from International-George Mason. However, at least thirteen of these graduates artificially delayed the date of their graduation until two weeks after the school was accredited. Thirteen of these applicants completed all of their course work prior to the time that the school was accredited, but by a bookkeeping device, they delayed award of their Juris Doctor degree until after the school was accredited. Six of the applicants started law school at the same time as petitioner, and four of them completed their courses either before or shortly after petitioner though their degree award was delayed.

At the same time that the respondent Board prohibited petitioner from taking the bar, the Board approved all sixteen of petitioner's classmates to take the bar exam solely for the reason that their degrees were not awarded until after the ABA accredited International-George Mason.

On February 12, 1982 petitioner filed a timely petition for review of the Board's decision, pursuant to Pennsylvania Bar Admission Rule 222, with the Supreme Court of Pennsylvania; (Appendix at 36); the petition alleged, among other grounds, that the Board's decision violated the United States Constitution. On February 17, 1981 before the Board filed its Statement of Action as required by Rule 222, the Supreme Court denied the petition. (Appendix at 34).

On March 3, 1981 petitioner filed a petition for reconsideration (Appendix at 19), which was granted by the Supreme Court on March 11, 1981 (Appendix at 17). The petition for reconsideration alleged that the Board's decision violated petitioner's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

On June 17, 1981 the Board filed its Statement of Action (Appendix at 10) with the Supreme Court. The Board's Statement

advised the Supreme Court that they denied petitioner's application to take the bar exam because "she did not graduate from a law school accredited by the American Bar Association." (Appendix at 11). The Board's Statement went on to note the merger of petitioner's law school and its subsequent ABA accreditation. The Board's Statement also noted that it had granted approval to numerous graduates of George Mason where in "some instances the transcripts revealed that the course requirements for obtaining the Juris Doctor degree were all or substantially completed well before the actual granting of the degree by George Mason." However, "since these George Mason applicants did have a degree from and [sic] ABA-approved school, the Board approved their applications." (Appendix at 13).

The Board's Statement went on to state that the Board would require all George

Mason graduates to demonstrate a "legitimate reason for the delay between the course completion and the degree granting." (Appendix at 15). As a result of this review, the Board argued that petitioner was treated equally to the other graduates.

In fact, however, the respondent Board never conducted any reviews of George Mason graduates to determine any reasons for the degree delay, and the Board never made any further determination with regard to the other George Mason graduates. No other George Mason graduate was prohibited from taking the bar, and no one who was admitted to the Bar had their admission revoked. See Stipulation of the Parties (Appendix at 1).

The Board never informed the Supreme Court, at least not on the record of petitioner's appeal, that contrary to its State-

ment, it never subsequently reviewed the delay in receipt of degrees by the other George Mason graduates. Counsel for the Board, Susan L. Anderson, Esquire, has informed counsel for petitioner that the Board never took further action because, contrary to its Statement to the Supreme Court, it believed, on further consideration, that its original decisions were proper so that no further review of the other graduates was required.

Petitioner and respondent did file a Stipulation of Facts to Supplement the Record (Appendix at 4) with the Supreme Court which included detailed facts about the other George Mason graduates who were permitted to take the bar. It also included a letter from the Honorable Hugh R. Jones, Judge of the Court of Appeals of New York advising that New York adopts a three year relation back of the accreditation of Inter-

national-George Mason to allow graduates such as petitioner to take the New York bar. (Appendix at 8).

The Supreme Court, upon reconsideration, on September 11, 1981 denied the petition for review of the Board's action with two Justices dissenting. (Appendix at 3). The Court did not issue an opinion explaining its reason or views of petitioner's constitutional claims.

As a result of this action, petitioner will forever be barred from taking the Pennsylvania bar exam despite the fact that her classmates who attended the same law school and took the same courses, from the same professors, are now admitted to the bar and practicing law in Pennsylvania.

ARGUMENT

A. DUE PROCESS REQUIRES THAT PRIOR TO FINALLY DEPRIVING A BAR APPLICANT OF THE RIGHT TO TAKE A BAR EXAM, A STATE MUST PROVIDE AN OPPORTUNITY FOR THE APPLICANT TO DEMONSTRATE FACTS SHOWING THAT SHE HAS RECEIVED A LEGAL EDUCATION CONFORMING TO THE BAR ADMISSION RULES WHEN HER SCHOOL WAS RECENTLY ACCREDITED.

This Court has held as early as 1926 that applicants for admission to the bar have a protected property interest, derived from the promulgated rules for admission, entitling them to "such a notice, hearing and opportunity to answer for the applicant as would constitute due process." Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 123 (1926). "The practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character." Baird v. State Bar of Arizona, 401 U.S. 1, 8 (1971); Schware v. Board of Bar Examiners, 353 U.S. 232, 239 n.5 (1957); Ex parte Garland, 71 U.S. 333 (1867).

Petitioner does not contend that a state cannot review an applicant's legal education and set minimum levels of eligibility, and she firmly agrees that "[a] State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar...." Schware v. Board of Bar Examiners, supra, 353 U.S. at 239. Rather she contends that "in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards." Id.

In order to determine whether an applicant meets the state's standards, a hearing or other evidentiary procedure must be established so that the applicant can be afforded the opportunity to demonstrate compliance with the state's bar admission rules. "[T]he requirements of procedural due process must be met before a State can exclude

a person from practicing law." Willner v. Committee on Character and Fitness, 373 U.S. 96, 102 (1963). The complete absence of any hearing process to resolve contested factual issues on bar applications is not consistent with due process. Id. at 99, 105.

The factual issue here is one shared by many graduates of newer law schools where accreditation is granted shortly after graduation. If accreditation is never granted, petitioner would not urge the need for a factual hearing on the adequacy of her legal education. But where accreditation is granted by the ABA, after proceedings to which the law students were not parties, due process requires a "fair investigation", Goldsmith v. United States Board of Tax Appeals, supra, 270 U.S. at 123, to determine if the students who received degrees before accreditation received a legal education commensurate with that received by those after accreditation is granted. Such a review is conducted by Judge Jones of the New York

Court of Appeals based on his recognition that accreditation is only granted after demonstration of a past history of acceptable legal education. (Appendix at 8).

According to Mathews v. Eldridge, 424 U.S. 319, 335 (1976), "the specific dictates of due process generally requires consideration of three distinct factors:" the private interest affected, the risk of an erroneous deprivation, and the state's interest including fiscal and administrative burdens.

The private interest, as held by the Court in Goldsmith, Schware, Willner and other cases, is acute. Petitioner, having graduated from law school, will be deprived of any opportunity to practice her chosen profession in the location of her choice.

This Court has recognized that even temporary deprivation of a driver's license which may be essential to one's livelihood is sufficiently important to require procedural due process protection. Bell v. Bur-

son, 402 U.S. 535, 539 (1971). Suspension of a horse race trainer "can be severe" requiring the "opportunity to be heard." Barry v. Barchi, 443 U.S. 55 (1979). Recoupment of Social Security, Califano v. Yamaski, 442 U.S. 682 (1979), termination of welfare benefits, Goldberg v. Kelly,397 U.S. 254 (1970), or a ten-day suspension of a student, Goss v. Lopez, 419 U.S. 565 (1975), are sufficiently serious to require procedural due process protection. Even summary seizure of goods which are not necessary requires procedural protection. Fuentes v. Shevin, 407 U.S. 67 (1972).

The permanent prohibition on sitting for the bar exam visited upon petitioner is far more acute than temporary utility shutoffs, but the Court has said that "cessation of essential [utility] services for any appreciable time works a uniquely final deprivation." Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 20 (1978).

Though the fact of law school accreditation would not seem to be the kind of issue on which there is a serious risk of error, understanding of the ABA accreditation process with its retrospective review of past legal education shows that a simplistic standard measured solely by the date of accreditation is insufficient. In order to avoid gross disparities in treatment of graduates, due process must require some type of evidentiary proceeding where fair investigation of the legal education of the applicant can be evaluated at least where the school has subsequently be accredited.

In a circumstance where the probability of error is much lower than for bar admissions, the Court has found the risk of error in utility billing practices to be sufficiently probable as to justify a required process. Memphis Light, Gas and Water Division v. Craft, supra, 436 U.S. at 20. Fault determinations are inherently subject to

error to require procedural review beyond written records. Califano v. Yamaski, supra, 442 U.S. at 696. Similarly, "the risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a 'neutral factfinder' to determine whether the statutory requirements for admission are satisfied." Parham v. J.R., 442 U.S. 584, 606 (1979).

Petitioner does not suggest that an oral evidentiary hearing is required, rather the risk of error in evaluating legal education can be made by review of the ABA accreditation reports together with written statements concerning curricula, faculty resources, library resources and other relevant factors. The review would be similar to the review of written materials by unbiased professionals approved in Mathews v. Eldridge, supra, 424 U.S. at 344. The investigation should be done for any recently

accredited law school in a procedure similar to the combined drug reviews approved in Weinberger v. Hynson, Westcott and Dunning, Inc., 412 U.S. 609, 625 (1973), in that one review would suffice per school, and no fact issue need be addressed regarding the particular legal education received by one specific student. Through a review of the school's legal education prior to accreditation, the reviewing board will "minimize the risk of erroneous decisions." Addington v. Texas, 441 U.S. 418 (1979).

Since petitioner contends that only one investigation per recently accredited school need take place, there will be little fiscal or administrative burden imposed on the state--the third Eldridge factor. Further, "it would seem as much in the State's interest as [petitioner's] to have an early and reliable determination with respect to the [adequacy of a legal education]." Barry v. Barchi, supra, 443 U.S. at 66.

Thus, the nature of the important interests at stake and the risk of error in the decision on adequacy of a legal education require procedural due process protection. The protected property interest in admission under a state's bar rules brings this case under the umbrella of Goldsmith and progeny and distinguishes it from Leis v. Flynt, 439 U.S. 438 (1979), where the discretionary nature of pro hac vice appearance prevents a protected entitlement from arising.

The petition should be granted to review Pennsylvania's departure from this Court's consistent holding that "some kind of hearing is required at some time before a person is finally deprived of his property interests." Memphis Light, Gas and Water Div. v. Craft, supra, 436 U.S. at 16.

B. A STATE CANNOT ENFORCE AN IRREBUTTABLE PRESUMPTION WHICH PREVENTS ADMISSION OF A LAWYER TO THE BAR SOLELY DUE TO THE PERSON'S GRADUATION BEFORE THE DATE OF A.B.A. ACCREDITATION.

"[P]ermanent irrebuttable presumptions

have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments." Vlandis v. Kline, 412 U.S. 441, 446 (1973). The problem with irrebuttable presumptions is that they are "not necessarily true in fact", Id. at 457, and they are "forbidden by the Due Process Clause ...when the state has reasonable alternative means of making the curcial determination." Id.

To paraphrase what this Court said in Cleveland Bd. of Education v. Lafleur, 414 U.S. 632, 643 (1974), the bar rules, as interpreted by the Board, "amount to a conclusive presumption" that every student who graduated from International-George Mason on the day after accreditation received an adequate legal education while anyone who graduated a short time before accreditation is conclusively presumed to have received an inadequate legal education despite the fact that both groups attended law school together.

The presumption of incapacity and ineligibility for unemployment compensation for women during an 18-week period before and

after childbirth was held to violate due process as an unconstitutional conclusive presumption since it prevented demonstration of an individual woman's lack of incapacity. Turner v. Dept. of Employment Security, 423 U.S. 44 (1975). The presumption at issue is equally offensive and permanently prevents petitioner from practicing her chosen profession, and is similar to the one in Stanley v. Illinois, 405 U.S. 645 (1972), that concluded that unmarried fathers were incompetent to raise children.

In each case, the conclusive presumption was invalidated because demonstration of relevant, individualized facts could prove that the presumption was not true. Here the conclusive presumption operates to forever prevent petitioner from sitting for the bar due to the presumed inadequacy of her legal education though her classmates who attended law school with her are conclusively presumed to have obtained an adequate legal education solely because they delayed graduation until two weeks after the school was accredited.

The inequitable operation of the conclusive presumption at issue deserves review for violation of fundamental due process.

C. EQUAL PROTECTION PREVENTS A STATE FROM ADMITTING ONE LAW STUDENT TO ITS BAR EXAM WHILE DENYING THAT OPPORTUNITY TO HIS CLASSMATE SOLELY DUE TO THE LATTER'S EARLIER RECEIPT OF HER LAW DEGREE.

"A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the...Equal Protection Clause of the Fourteenth Amendment." Schware v. Bd. of Law Examiners, supra, 353 U.S. at 238-239. "[A]ny qualification must have a rational connection with the applicant's fitness or capacity to practice law." Id. at 239. "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the objective of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)." Reed v. Reed, 404 U.S. 71 76 (1971).

"[A] law nondiscriminatory on its face may be grossly discriminatory in its operation." Williams v. Illinois, 399 U.S. 235, 242 (1970), quoting Griffin v. Illinois, 351 U.S. 12, 17, n.11 (1956).

Though, on its face, Pennsylvania Bar Admission Rule 203 appears rational and legitimate as a means of "requir[ing] appropriate training", In re Griffiths, 413 U.S. 717, 725 (1973), in practice it offends the mandate that "in regulating the practice of law a State cannot ignore the rights of individuals secured by the Constitution." Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1, 6 (1964).

As applied to petitioner and anyone who received their degree on any date before a law school was accredited, Rule 203 forever prevents them from taking Pennsylvania's bar exam even though, as in petitioner's case, her classmates delayed their receipt of a degree until just after accreditation and were thereby permitted to take the bar and commence practicing law in Pennsylvania.

The Board, realizing the disparities in treatment created by the Rule, advised the Pa. Supreme Court that they would review all applicants from International-George Mason for legitimate reasons in delaying their graduation. (Appendix at 15). However, as the parties have stipulated before this Court, "no proceedings or inquiries were conducted... since the Board of Law Examiners following further consideration of the matter determined that no action would be taken."(Appendix at 1A).

Clearly, there is no rational basis for treating petitioner and her law school classmates so differently when such vital personal property and liberty interests are at stake. Bookkeeping delays of degrees cannot be used to treat graduates of the same law school so differently, and petitioner has suffered "grossly discriminatory" operation of Rule 203 which prevents her from practicing law.

On this issue, the petition should be granted and summary vacation of the Pa. Supreme Court order entered so that petitioner may take the July, 1982 Pa. Bar Examination.

D. PENNSYLVANIA'S ELIMINATION OF WAIVERS OF THE LAW SCHOOL ACCREDITATION RULE AFTER PETITIONER COMPLETED LAW SCHOOL IS A RETROSPECTIVE RULE WHICH VIOLATES DUE PROCESS.

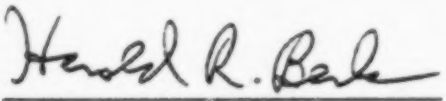
"The Due Process Clause of the Fourteenth Amendment generally does not prohibit retrospective civil legislation, unless the consequences are particularly 'harsh and oppressive.' Welch v. Henry, 305 U.S. 134, 147 (1938)." United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 17 n.13 (1977). Cf. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-19 (1976).

At the time petitioner entered law school, Penna. granted waivers of the accreditation rule as is done in New York. See In re Sylk, 376 Misc. Doc. 21 (Pa. 1977); Appeal of Jacob 82 Misc. Doc. 13 (Pa. 1964). However, that practice stopped after petitioner graduated thus resulting in the total ban on her admission to practice law. This "harsh and oppressive" result is the type of retrospective rule which violates due process. The petition should be granted to consider this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the order of the Pennsylvania Supreme Court vacated, and the case remanded with directions allowing petitioner to take the July, 1982 Pennsylvania bar exam.

Respectfully submitted,



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STIPULATION OF THE PARTIES

Petitioner and respondent, by their counsel, stipulate that the following facts are true:

1. The parties filed a Stipulation of Facts to Supplement the Record before the Supreme Court of Pennsylvania dated July 6, 1981, a copy of which is attached hereto.

2. Said Stipulation states that the Pennsylvania Board of Law Examiners granted approval to sixteen graduates of George Mason University School of Law during 1980 to sit for the February, 1981 Pennsylvania Bar Examination.

3. After filing of the Statement of Action of the Pennsylvania Board of Law Examiners with the Supreme Court of Pennsylvania, no proceedings or inquiries were conducted, as was proposed in numbered paragraphs 1 and 2 of the second page of the Statement, concerning requirements for the sixteen graduates of George Mason University School of Law, since the Board of Law Examiners following further consideration of the matter determined that no action would be taken.

4. None of the sixteen persons listed in the Stipulation has had their admission to the bar of the Supreme Court of Pennsylvania revoked.

Dated: February 4, 1982

Harold R. Berk

HAROLD R. BERK
Attorney for Petitioner
Esther Kirshenbaum

Charles W. Johns

CHARLES JOHNS
Attorney for Respondent
Pennsylvania Board of
Law Examiners

SUPREME COURT OF THE UNITED STATES

No. A-528

ESTHER KIRSHENBAUM,

Petitioner

v.

PENNSYLVANIA BOARD OF BAR EXAMINERS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 8, 1982.

/s/ William J. Brennan, Jr.
Associate Judge of the
Supreme Court of the
United States

Dated this 16th
day of December, 1981

SUPREME COURT OF PENNSYLVANIA

Eastern District

CARL RICE, ESQ.
Prothonotary

468 City Hall
Philadelphia 19107
(215) 686-3581-84

September 16, 1981

Ms. Esther Kirshenbaum
208 E. Mt. Airy Avenue
Philadelphia, PA 19119

Jeffrey Ivan Pasek,
Esquire
22nd Fl., PSFS Bldg.
Philadelphia, PA 19107

Re: In the Matter of the Appeal
of Esther Kirshenbaum, etc.
No. 25 E.D. Misc. Docket 1981

Dear Ms. Kirshenbaum and Mr. Pasek:

This is to advise you that the following Order has been endorsed on the Petition for Review, filed in the above-captioned matter:

"September 11, 1981

Upon Reconsideration, Petition Denied. Per curiam. Mr. Justice Larsen and Mr. Justice Flaherty would grant.

Very truly yours,

/s/Carl Rice, Esquire
Prothonotary

CR:ltl

cc: Susan L. Anderson, Esquire
Secretary - PBLE

IN THE SUPREME COURT OF PENNSYLVANIA

IN THE MATTER OF THE APPEAL OF ESTHER KIRSHENBAUM FROM THE DECISION OF THE PENNSYLVANIA BOARD OF LAW EXAMINERS	:	NO. 25 E.D. MISC. DOCKET 1981

STIPULATION OF FACTS
TO SUPPLEMENT THE RECORD

Counsel to the Pennsylvania Board of Law Examiners ("Board") and counsel to the Appellant hereby stipulate to the following facts to supplement the record in the above-captioned matter.

1. At its October 24, 1980 meeting, the Board granted approval for nine graduates of George Mason University School of Law to sit for the February, 1981 Pennsylvania Bar Examination. According to the Board's records, all of the nine graduated on August 23, 1980.

2. At the time the Board granted such approval, it was in possession of law school transcripts which showed the following dates for the initial enrollment and last semester for each of the nine persons:

	Date of Initial Enrollment	Date of Last Semester
(1)	Fall 1975	Winter 1979
(2)	Fall 1974	Fall 1977
(3)	Fall 1976	Spring 1980
(4)	Fall 1974	Winter 1978
(5)	Fall 1976	Fall 1979
(6)	Fall 1975	Spring 1980
(7)	Fall 1973	Fall 1979
(8)	Fall 1976	Summer 1980
(9)	Fall 1974	Winter 1976

3. Subsequent to October 24, 1980, the Board granted approval for seven more graduates of George Mason University School of Law to sit for the February, 1981 Pennsylvania Bar Examination. According to the Board's records, all of the seven graduated on August 23, 1980.

4. At the time the Board granted such approval, it was in possession of

law school transcripts which showed the following dates for the initial enrollments and last semester for each of the seven persons:

	Date of Initial Enrollment	Date of Last Semester
(1)	Fall 1976	Spring 1979
(2)	Fall 1974	Spring 1978
(3)	Fall 1976	Spring 1980
(4)	Fall 1977	Spring 1980
(5)	Fall 1974	Summer 1980
(6)	Fall 1977	Spring 1980
(7)	Fall 1974	Summer 1980

5. All of the 16 individuals described in paragraphs 2 and 4, above, began law school at the International School of Law. Those persons whose last semester was prior to 1978 also completed law school course work prior to the merger of the International School of Law into George Mason University.

6. As of this date, with regard to the 16 persons listed above who have passed the Pennsylvania Bar Examination and have

been admitted to practice in Pennsylvania, none of them have had their admissions revoked by this Honorable Court.

7. The attached copy of a letter from the Honorable Hugh R. Jones, Judge, New York Court of Appeals set forth that state's practice of waiving the requirement that applicants attend an approved law school with respect to graduates of George Mason University Law School (formerly International School of Law). See Exhibit A.

PENNSYLVANIA BOARD
OF LAW EXAMINERS

By: /s/
Susan L. Anderson,
Esquire

By: /s/
Jeffrey Ivan Pasek,
Esquire

State of New York
Court of Appeals

Court of Appeals
Hall
Albany, NY 12207

Hugh R. Jones
Judge

April 29, 1981

Jeffrey Ivan Pasek, Esq.
Messrs. Cohen, Shapiro,
Polisher, Shiekman & Cohen
Philadelphia Saving Fund Bldg.
12 South Twelfth Street
Philadelphia, Pennsylvania 19107

Dear Mr. Pasek:

In response to your letter of April 24th, I would inform you that it has been my practice, acting in an administrative capacity on behalf of our Court, to grant waivers (pursuant to the provisions of Section 520.10 of our Rules for Admission of Attorneys and Counselors-at-Law) of our requirement of attendance at an approved law school where the applicant has demonstrated that his or her attendance and receipt of degree from the unapproved law school occurred within three years of the

subsequent approval of the law school. The principle on which such waivers have been granted has been that the eventual approval of the law school is necessarily predicated on its performance in the years immediately preceding formal accreditation.

I have recollection that in accordance with this principle waivers have been granted to some of the recent graduates of George Mason University Law School (formerly International School of Law).

I trust that this information will be of some assistance to you.

Sincerely yours,

/s/ Hugh R. Jones

HRJ:w

PENNSYLVANIA BOARD OF LAW EXAMINERS
Public Ledger Building
Independence Square
Philadelphia, PA 19106
(215) 627-3246

DESMOND J. McTIGHE,
CHAIRMAN
JUSTIN M. JOHNSON,
VICE CHAIRMAN
JOHN W. ENGLISH, SR.
ANTHONY S. MINISI
JAMES W. SCANLON

SUSAN L. ANDERSON
SECRETARY/TREASURER

June 17, 1981

STATEMENT OF THE ACTION OF THE
PENNSYLVANIA BOARD OF LAW EXAMINERS

TO THE HONORABLE, THE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF PENNSYLVANIA

In the Matter of the Appeal of Esther Kirshenbaum from the Decision of the Pennsylvania Board of Law Examiners

No._____Miscellaneous Docket No.

_____

On October 2, 1980, Esther Kirshenbaum filed an application with the Pennsylvania Board of Law Examiners for permission to

sit for the February, 1981 bar examination under Pa. B.A.R. 203.

On October 24, 1980, the Board denied her petition because Ms. Kirshenbaum did not meet the educational requirements of Pa. B.A.R. 203(2) in that she did not graduate from a law school accredited by the American Bar Association.

The record reveals that Ms. Kirshenbaum pursued her legal education at International School of Law, Arlington, Virginia, from September, 1974 to August, 1977 and received her Juris Doctor degree in August, 1977. At that time, the school was not accredited by the American Bar Association.

Sometime in 1978, International School of Law merged with the George Mason University and in August, 1980 the American Bar Association granted provisional accreditation to the George Mason University School of Law.

At that time, the Board received numerous applications from graduates of George Mason whose official transcripts indicated that their graduation date was August 23, 1980. In some instances the transcripts revealed that the course requirements for obtaining the Juris Doctor degree were all or substantially completed well before the actual granting of the degree by George Mason. As Pa. B.A.R. 203(2) requires that an applicant

must have received an earned Juris Doctor degree from an A.B.A. approved school and since these George Mason applicants did have a degree from an A.B.A. approved school, the Board approved their applications.

Ms. Kirshenbaum has argued that she is no different from some of the other George Mason graduates who were permitted to sit for the Pennsylvania bar examination. Her position is that their education is identical to hers and the only difference between them is the fact that they deliberately withheld receiving their degrees until George Mason was accredited.

In an effort to inform the Supreme Court of the actions taken by the Pennsylvania Board of Law Examiners and the arguments of Ms. Kirshenbaum, Ms. Kirshenbaum's lawyer, Jeffrey I. Pasek, and Susan L. Anderson, Secretary of the Board, met with Justice Robert N. C. Nix. Justice Nix expressed the belief that those George Mason graduates who delayed the granting of their degrees, did so in conjunction with their law school to deliberately avoid the requirements of the Pennsylvania rule by giving the Board the impression that their legal education was, in fact, ABA approved.

As a result of that meeting, the Pennsylvania Board of Law Examiners has taken the following actions with regard to those George Mason graduates.

1. Any applicant for the Pennsylvania bar examination, whether a first-timer or a repeater, has been informed that he or she will not be permitted to sit in Pennsylvania unless or until the Board is convinced that there was a legitimate reason for the delay between the course completion and the degree granting.

2. Any individual who has already been admitted to the Bar has been informed that he or she will have to convince the Board that there is a legitimate reason

for the delay between the course completion and the degree granting or a petition will be filed with your Honorable Court recommending that the admission be revoked.

Ms. Kirshenbaum graduated from an unapproved law school and, therefore, does not meet the requirements of Pa. B.A.R. 203(2). Any argument that she has not been treated equally with other George Mason graduates has now become moot by the Board's actions. According, therefore, the Board respectfully requests and recommends that this Petition for Reconsideration be denied.

Respectfully submitted,

/s/ SUSAN L. ANDERSON
Secretary

SLA/lbk

SUPREME COURT OF PENNSYLVANIA

Eastern District

CARL RICE, ESQ.
Prothonotary
CATHERINE E. LYDEN
Deputy Prothonotary

456 City Hall
Philadelphia 19107
(215)686-3581-84

March 16, 1981

Jeffrey Ivan Pasek, Esquire
22nd Floor, PSFS Building
Philadelphia, PA 19107

RE: In the Matter of the Appeal of
Esther Kirshenbaum From the
Decision of the Pennsylvania
Board of Law Examiners
Petition of: Esther Kirshenbaum
No. 25 E.D. Misc. Dkt. 1981

Dear Mr. Pasek:

This is to advise you that the following Order has been endorsed on your Petition for Reconsideration, filed in the above-captioned matter:

"March 11, 1981

Petition GRANTED.

s/ HENRY X. O'BRIEN,
Chief Justice."

(continued)

Very truly yours,

Carl Rice, Esquire
Prothonotary

By: /s/ Catherine E. Lyden
Deputy Prothonotary

CEL/fm

cc: Susan L. Anderson, Esquire
Ms. Esther Kirshenbaum

IN THE SUPREME COURT OF PENNSYLVANIA

IN THE MATTER OF THE APPEAL OF ESTHER KIRSHENBAUM FROM THE DECISION OF THE PENNSYLVANIA BOARD OF LAW EXAMINERS	:	NO. 25 E.D. MISC. DOCKET 1981

PETITION FOR RECONSIDERATION

NOW COMES Esther Kirshenbaum, by her attorneys Jeffrey Ivan Pasek, Esquire and Cohen, Shapiro, Polisher, Shiekman and Cohen, and petitions this Honorable Court for reconsideration of its Order of February 17, 1981 in the above captioned matter. In support of this Petition, Petitioner respectfully submits the following:

1. On October 2, 1980, Esther Kirshenbaum filed an application with the Pennsylvania Board of Law Examiners (herein called "the Board") to sit for the February, 1981 bar examination under Pa. B.A.R. 203.

2. The Board denied her application on October 24, 1980 because she attended a law school which was not accredited by the American Bar Association (herein called "A.B.A.") at the time of her graduation. The Board did not provide Petitioner with any hearing in connection with her application.

3. On November 26, 1980, Petitioner initiated a timely appeal of the Board's ruling by filing a Notice of Intention to Appeal pursuant to Pa. B.A.R. 222(b).

4. On January 13, 1981, the Board filed a statement of its action in this Court, thereby triggering the time limits established pursuant to Pa. B.A.R. 222(c) and (d).

5. On February 12, 1981, Petitioner filed a timely Petition for Review pursuant to Pa. B.A.R. 222(c).

6. On or about February 17, 1981, this Honorable Court denied the Petition

for Review. Such action by this Court was taken (i) before Petitioner had been notified that the Board filed the record in this matter with the Prothonotary; and (ii) before the 30-day time period expired within which Petitioner was entitled to serve and file a brief pursuant to Pa. B.A.R. 222(d).

7. Petitioner attended the International School of Law in Arlington, Virginia (herein called "International") from September, 1974 until August, 1977, at which time she received a Juris Doctor degree. Petitioner was thereafter permitted to register to sit for the District of Columbia Bar Examination, although she had not yet taken that examination.

8. At the time Petitioner graduated from International, the school had not yet been accredited by the A.B.A. Upon knowledge, information and belief, Petitioner

asserts that the refusal of the A.B.A. to accredit International was based principally upon its belief that the school did not have sufficient long-range financial stability so as to be suitable for provisional accreditation.

9. Subsequent to Petitioner's graduation, International merged with George Mason University to become the George Mason University Law School (herein called "George Mason"). As a result of this merger, the law school obtained sufficient long-range financial stability to meet A.B.A. approval. In August, 1980, George Mason received provisional accreditation by the A.B.A.

10. Between the time that Petitioner graduated International and the time that George Mason received provisional accreditation, the faculty, administration, library, physical plant, curriculum and school policy

did not change in any significant way.

11. In considering Petitioner's application to sit for the Bar Examination, the Board failed to make an independent determination on the quality and sufficiency of Petitioner's legal education. Instead, it relied solely upon the fact that she did not attend an A.B.A. accredited law school.

12. To the best of Petitioner's knowledge, neither the Board nor the A.B.A. has any procedure available by which Petitional or others similarly situated may challenge the accuracy of the A.B.A.'s decision not to have accredited International. In the absence of such procedure, the Board's reliance upon A.B.A. accreditation operates as an unconstitutional "conclusive presumption" which violates Petitioner's Due Process rights. Cleveland Board of Education v. LaFleur, 414 U.S. 632, 644 (1974);

Vlandis v. Kline, 412 U.S. 441, 446 (1973); Stanley v. Illinois, 405 U.S. 645, 649 (1972). Its effect is to deny Petitioner the right to pursue her occupation in Pennsylvania, and to deny others the opportunity to avail themselves of her services, because of a decision by the A.B.A. over which Petitioner is powerless to seek redress.

13. Upon knowledge, information and belief, Petitioner asserts that the Board has permitted other graduates of International/George Mason to sit for the Pennsylvania Bar Examination despite the fact that such persons completed their legal studies prior to the time that the A.B.A. granted provisional accreditation to George Mason. Considered against the background of such conduct, the Board's refusal to approve Petitioner's application was arbitrary and capricious and violated Petitioner's Due Process rights.

14. Upon knowledge, information and belief, Petitioner asserts that the Board has permitted other graduates of International/George Mason to sit for the Pennsylvania Bar Examination if such persons "graduated" after George Mason obtained A.B.A. accreditation despite the fact that such persons completed all or substantially all of their course work prior to the time George Mason was accredited and, thereafter, artificially delayed graduation until after the school received its accreditation. Considered against the background of such conduct, the Board's refusal to approve Petitioner's application was arbitrary and capricious and violated Petitioner's Due Process rights.

15. Pennsylvania B.A.R. 203-205 are unconstitutional as applied because they permit the Board to consider the individual educational qualifications of an applicant who has not attended an A.B.A. accredited

school if and only if such applicant attended a law school outside of the United States. By denying a person such as Petitioner the opportunity to have her legal education evaluated individually by the Board, such rules intentionally create a disparate adverse impact upon citizens of the United States, in preference to foreign nationals, thereby depriving Petitioner of her rights under the Privileges and Immunities clause of the Fourteenth Amendment to the United States Constitution.

16. For the reasons set forth above, Pa. B.A.R. 203-205 unlawfully discriminate against applicants, including Petitioner, on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d to which this Court is subject by virtue of its receipt of Federal financial assistance.

17. For the reasons set forth above, Pa. B.A.R. 203-205 limit persons who wish to attend unaccredited law schools to attending such schools outside the United States if such persons desire to practice law in Pennsylvania. As applied, such rules create an unreasonable burden on Interstate Commerce in violation of Article I, Section 8 of the United States Constitution.

18. Pennsylvania B.A.R. 203-205 are arbitrary and capricious in that they permit some applicants but not others who have graduated from non-A.B.A. accredited law schools to sit for the Bar Examination with permitting each such applicant to have an individualized determination made by the Board on the sufficiency of his or her legal education. As a result, Pa. B.A.R. 203-205 operate in continued violation of Judge Weiner's Order in Murphy v.

Egan, C.A. No. 79-2866 (E.D. Pa., decided April 3, 1980), judgment vacated as moot, ___ F.2d ___, No. 80-1752 (3d Cir. decided December 11, 1980).

19. Pennsylvania B.A.R. 203 is unlawful on its face because it unconstitutionally delegates to the A.B.A., without adequate standards, safeguards or procedures for redress, exclusive authority to determine which law schools shall be accredited, thereby determining which persons shall be ineligible to sit for the Bar Examination. The rule thereby violates Article V, Section 10(c) of the Pennsylvania Constitution. Petitioner respectfully submits that this Court's decision in Appeal of Murphy, 482 Pa. 43, 393 A.2d 369 (1978), was wrong and that such decision should be reviewed in light of the United States Supreme Court's subsequent decision in Industrial Union Dept. AFL-CIO v. American Petroleum Insti-

tute, ___ U.S. ___, 100 S. Ct. 2844, 65 L.Ed.2d 1010, 1037 (1980).

20. This Petition for Reconsideration is presented in good faith and not for delay and is restricted to the grounds set forth above.

WHEREFORE, Petitioner prays this Court to reconsider its Order of February 17, 1981, and to remand this case to the Board with instructions to schedule a hearing to permit Petitioner to present evidence proving the facts set forth above, to present a brief in support of her position and to request a waiver of the strict application of Rule 203 based upon the facts established in this case.

Dated: March 3, 1981

Respectfully submitted,

JEFFREY IVAN PASEK, ESQUIRE
22nd Floor, Philadelphia
Saving Fund Building
12 South Twelfth Street
Philadelphia, PA 19107
(215) 922-1300
Attorney for Petitioner

OF COUNSEL:

COHEN,
SHAPIRO,
POLISHER,
SHIEKMAN &
COHEN

IN THE SUPREME COURT OF PENNSYLVANIA

IN THE MATTER OF THE APPEAL OF ESTHER KIRSHENBAUM FROM THE DECISION OF THE PENNSYLVANIA BOARD OF LAW EXAMINERS	:	NO. 25 E.D. MISC. DOCKET 1981

AFFIDAVIT

Before me, the undersigned Notary Public, personally appeared Esther Kirshenbaum, who, being duly sworn according to law, deposes and said the following:

1. I am the Petitioner in the above-captioned matter.

2. I have read the foregoing Petition for Reconsideration and the facts set forth therein are true and correct to the best of my knowledge, information and belief.

_____
ESTHER KIRSHENBAUM

Sworn to and subscribed
before me this 3rd day
of March, 1981.

_____
NOTARY PUBLIC

IN THE SUPREME COURT OF PENNSYLVANIA

IN THE MATTER OF THE APPEAL OF ESTHER KIRSHENBAUM FROM THE DECISION OF THE PENNSYLVANIA BOARD OF LAW EXAMINERS	:	NO. 25 E.D. MISC. DOCKET L981

NOTICE OF CHALLENGE
TO CONSTITUTIONALITY OF GENERAL RULES

TO: Court Administrator of Pennsylvania
Administrative Office of Pennsylvania Courts
1414 Three Penn Center Plaza
Philadelphia, PA 19102

Please take Notice that Petitioner in the above-captioned matter draws in question the constitutionality of Pa. B.A.R. 203-205. A copy of that portion of the record raising this issue is attached hereto pursuant to Pa. R.A.P. 522(a).

Dated: March 3, 1981

OF COUNSEL:

COHEN, SHAPIRO, POLISHER, SHIEKMAN AND COHEN

JEFFREY IVAN PASEK, ESQ.
22nd Floor, Philadelphia Saving Fund Building
12 South Twelfth Street
Philadelphia, PA 19107
(215) 922-1300
Attorney for Petitioner

IN THE SUPREME COURT OF PENNSYLVANIA

IN THE MATTER OF THE APPEAL OF ESTHER KIRSHENBAUM FROM THE DECISION OF THE PENNSYLVANIA BOARD OF LAW EXAMINERS	:	NO. 25 E.D. MISC. DOCKET 1981

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a copy of the foregoing Petition for Reconsideration and Notice of Challenge to Constitutionality of General Rules to be served by first class, certified U.S. Mail, return receipt requested, upon:

Susan L. Anderson, Esquire
Pennsylvania Board of Law Examiners
Public Ledger Building
Independence Square
Philadelphia, PA 19106

and

The Honorable Alexander F. Barbieri
Court Administrator of Pennsylvania
Administrative Office of Pennsylvania Courts
1414 Three Penn Center Plaza
Philadelphia, PA 19102

in accordance with Rule 121 of the Pennsylvania Rules of Appellate Procedure.

Dated: March 3, 1981.

OF COUNSEL:

COHEN, SHAPIRO, POLISHER, SHIEKMAN AND COHEN

JEFFREY IVAN PASEK, ESQ.
22nd Floor, Philadelphia Saving Fund Building
12 South Twelfth Street
Philadelphia, PA 19107
(215) 922-1300
Attorney for Petitioner

SUPREME COURT OF PENNSYLVANIA

Eastern District

CARL RICE, ESQ.
Prothonotary
CATHERINE E. LYDEN
Deputy Prothonotary

456 City Hall
Philadelphia 19107
(215) 686-3581-84

February 20, 1981

Alan H. Gilbert, Esquire
1314 Chestnut Street
6th Floor
Philadelphia, PA 19107

RE: In the Matter of the Appeal of Esther Kirshenbaum from the Decision of the Pennsylvania Board of Law Examiners
Petition of: Esther Kirshenbaum, No. 25 E.D. Misc. Dkt. 1981

Dear Mr. Gilbert:

This is to advise you that the following Order has been endorsed on your Petition for Review, filed in the above-captioned matter:

"February 17, 1981.

Petition DENIED.

s/ Per Curiam."

Very truly yours,

Carl Rice, Esq.
Prothonotary

By: /s/
Catherine E. Lyden
Deputy Prothonotary

CEL/fm

cc: Susan L. Anderson, Esquire

IN THE SUPREME COURT OF PENNSYLVANIA

KIRSHENBAUM,
Petitioner

v.

PENNSYLVANIA BOARD
OF LAW EXAMINERS,
Respondent

PETITION FOR REVIEW

1. This Court has jurisdiction pursuant to 42 Pa. C.S.A. Section 725(4).

2. Petitioner is Mrs. Esther Kirshenbaum, 208 East Mt. Airy Avenue, Philadelphia, Pennsylvania 19119.

3. Respondent is the Pennsylvania Board of Law Examiners.

4. By letter of January 13, 1981, Respondent denied Petitioner's appeal from Respondent's denial for Petitioner's enrollment in the February, 1981 Bar Examination.

5. Said decision violates both the Pennsylvania and Federal Constitution.

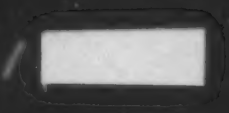
WHEREFORE, Petitioner seeks review of said decision and prays that this Court will reverse Respondent's decision.

Dated:

_____

/s/
Alan H. Gilbert, Esq.
#15159
Attorney for Petitioner
1314 Chestnut Street
Philadelphia, PA 19107
(215) 732-3688

Opposition



Office - Supreme Court, U.S.
FILED
MAY 14 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1491

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ESTHER KIRSHENBAUM, *Petitioner*

v.

PENNSYLVANIA BOARD OF LAW EXAMINERS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF
PENNSYLVANIA

BRIEF OF RESPONDENT, PENNSYLVANIA BOARD OF LAW EXAMINERS

Howland W. Abramson, Esquire
Charles W. Johns, Esquire
Legal Counsel to the
Administrator of Pennsylvania Courts
Attorneys for Respondent,
Pennsylvania Board of Law Examiners

Administrative Office of
Pennsylvania Courts
1414 Three Penn Center Plaza
Philadelphia, Pa. 19102
(215) 496-4523

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

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No. 81-1491

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ESTHER KIRSHENBAUM,

Petitioner

v.

PENNSYLVANIA BOARD OF LAW EXAMINERS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT
OF PENNSYLVANIA

BRIEF OF RESPONDENT, PENNSYLVANIA BOARD OF LAW EXAMINERS

COUNTER-STATEMENT OF MATERIAL FACTS

The Petitioner attended the International School of Law (International) in Arlington, Virginia, from September of 1974 until August of 1977, at which time she graduated. At no time during her matriculation at International was the law school accredited by the American Bar Association (ABA). In fact, accreditation had been *denied* from shortly after the school's creation, when it applied for accreditation in 1972, until August 6th of 1980 when it was provisionally accredited as the George Mason University School of Law (George Mason). The change in name was the result of International's merger with George Mason University in July of 1979.

In September of 1980, Petitioner applied for admission to the bar of the Supreme Court of Pennsylvania under Pennsylvania Bar Admission Rule (Pa.B.A.R.) 203. At the time of Petitioner's application, Pa.B.A.R. 203 provided:

> *Admission of Graduates of Accredited Institutions*
>
> (a) The general requirements for admission to the bar of this Commonwealth are:
>
> * * *
>
> (2) Receipt without exception of an earned . . . degree from an accredited law school.

The rule was amended on December 17, 1981, as follows:

> *Admission of Graduates of Accredited Institutions*
>
> (a) Bar examination
>
> The general requirements for permission to sit for the bar examination are:
>
> * * *

> (2) Completion of the study of law at and receipt without exception of an earned . . . degree from an accredited law school.

On October 24, 1980, the Pennsylvania Board of Law Examiners (Board) reviewed Petitioner's Petition to sit for the bar and denied it. At the same time, Petitioner was advised of a right to appeal to the Supreme Court of Pennsylvania from the Board's decision under Pa.B.A.R. 222.

On November 26, 1980, Petitioner did provide notice to the Board of intent to seek judicial review of the Board's determination of October 24, 1980.

On January 13, 1981, the Board filed with the Supreme Court of Pennsylvania a Statement of Action describing the circumstances surrounding the decision to deny the Petitioner's Petition to sit for the bar. (Appendix: A-1). The Statement concluded that Petitioner had not met the requirements of Pa.B.A.R. 203, i.e., receipt without exception of an earned degree from an accredited law school.

Thereafter, on or about February 12, 1981, Petitioner by counsel petitioned the state supreme court for review. (Petitioner's Appendix: 36). The petition claimed that the Board's decision violated the Pennsylvania and federal constitutions but neglected to be more specific than that.

On February 17, 1981, the state supreme court denied the petition for review. (Petitioner's Appendix: 34)

On or about March 3, 1981, the Petitioner, by way of new counsel, petitioned the state supreme court for reconsideration (Petitioner's Appendix: 19). In the petition for reconsideration, Petitioner stipulated that she had not graduated from an accredited law school (in fact, she had graduated three years before accreditation). Allegations were made by Petitioner that the Board had not made an independent determination concerning the

quality and sufficiency of Petitioner's legal education but had relied on the ABA accreditation process. Further, the Petitioner complained that the Board had no procedure whereby she could challenge the ABA's decision. Finally, Petitioner complained that several other graduates who were in her class at George Mason had been permitted to sit for the bar despite the fact that they had completed their studies at the same time she did, before George Mason obtained accreditation, but, by delaying receipt of their diplomas, graduating thereafter. These latter graduates and Petitioner attended school when the school was explicitly disapproved for accreditation by the ABA. And the delayed degree granting practice of the law school, having come to the attention of the ABA, was forcefully condemned by resolution of the ABA Council of the Section of Legal Education & Admissions to the Bar made on December 6, 1980 and communicated to the Board on December 16, 1980. (Appendix: A-3)

On March 11, 1981, the state supreme court granted Petitioner's Motion for Reconsideration. (Appendix: A-12)

Thereafter, on June 17, 1981, the Board filed a second Statement of Action with the state supreme court (Appendix: A-5). The Board stated that it had indeed permitted George Mason graduates to sit for the bar whose transcripts reflected that they had completed their schooling long before accreditation but had received their degrees after accreditation three years later.

Mr. Justice Robert N.C. Nix, Jr., of the Pennsylvania Supreme Court, was reported in the Statement to have expressed at a meeting between the Board and Petitioner's counsel the belief that these unnamed graduates had deliberately created a fact pattern intended to circumvent the requirements of Pa.B.A.R. 203. As a result of that meeting, the Board represented to the state supreme court that it had taken the following actions with regard to the George Mason graduates:

1. Any applicant (from George Mason) for the bar has been informed that he or she will not be permitted to sit unless the Board is convinced that there was a legitimate reason for the delay between course completion and degree granting.

2. Any individual (from George Mason) already admitted to the bar has been informed that he or she will have to convince the Board that there was a legitimate reason for the delay between course completion and graduation or a petition will be filed that admission be revoked.

On June 17, 1981, the Board sent letters to the graduates in question pursuant to these statements of intent. (Appendix: A-8, A-10). The board was of the opinion that Plaintiff's claims of unequal treatment were mooted by its actions.

On July 27, 1981, Petitioner filed a Brief with the state supreme court on judicial review of the Board's action of October 24, 1980. The statement of the question involved as defined by Petitioner to the state supreme court was as follows:

> Did the Board of Law Examiners violate Appellant's Due Process and Equal Protection rights in denying her the right to sit for the Pennsylvania Bar Examination? Not answered by the governmental unit below.

Petitioner represented to the state supreme court that true to its Statement of Action filed on the appeal, the Board had notified the George Mason graduates in question that any hiatus between course completion and graduation would need to be explained, else they could not sit for the bar or would suffer petitions to have their admissions revoked. (Appendix: A-13). As a result of the Board's action, two George Mason graduates, then lawyers in Pennsylvania, on June 25, 1981, sued to enjoin the state supreme court and the Board from revoking

their admissions. *Kostelansky v. The Supreme Court of Pennsylvania,* E.D. Pa. Civil Action No. 81-2558. The case was dismissed without prejudice.

On September 11, 1981, the state supreme court denied Petitioner's petition for review under reconsideration, without opinion. (Appendix: 14)

On December 17, 1981, the state supreme court clarified its implicit intent in promulgating the prior Pa. B.A.R. 203 by stating explicitly that the *schooling* must have been received from an accredited law school and not merely the degree. This intent parallels that of the ABA resolution of December 6, 1980 (Appendix: A-3).

Counsel for the Petitioner has represented in his Petition to this Court that the Board believes the original outcome to have been proper. This is not a matter of record. To the contrary, it is a matter of record only that the Board determined finally that no action would be taken against the delayed graduates (Petitioner's Appendix: 1). Petitioner has never complained of this alleged inaction to the state supreme court, presumably because her interests are served by a perpetuation of the circumvention of the spirit of the bar rules.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO HEAR THIS MATTER

Petitioner appealed to the state supreme court from the Pennsylvania Board of Law Examiners which denied her application to sit for the Pennsylvania Bar for the reason that she had not graduated from an accredited law school. After an initial petition was denied by the court, Petitioner requested reconsideration which was granted (Appendix: A-12). Before the state supreme court upon reconsideration was a record consisting of the Petition for Reconsideration and Brief raising due process issues to the effect that the Board may not delegate the responsibility to the ABA to evaluate law schools and that the Board must provide a means whereby an applicant may challenge an evaluation of the ABA. The Petitioner raised an equal protection argument to the effect that other bar applicants had successfully circumvented the spirit of Pa.B.A.R. 203, requiring receipt of a degree from an accredited law school. This was accomplished by starting and completing their course work at the same time as Petitioner, at a law school specifically disapproved by the ABA for accreditation, but through the artifice of delay in receiving their degrees for three years after their course work was completed, managing to get their diplomas dated after the event of accreditation. Petitioner, realizing that these graduates had slipped through a crack, attempted to seize upon the opportunity to jump on the band wagon.

The Board denied her a seat and advised the state supreme court in its Statement of Action filed upon the Petition for Reconsideration that those applicants and attorneys who had delayed in receiving their degrees would be examined and suffer revocation of admission to the bar if the spirit of Pa.B.A.R. 203 had been evaded. The Board had been advised by the ABA on December 16, 1980 that this diploma delay practice was violative of ABA policy and would in effect be cause for denial of ac-

creditation to a school engaging in it. (Appendix: A-3) There was, however, no revocation by the ABA of George Mason's provisional accreditation for the school having preyed upon the state bar's reliance on ABA accreditation as a condition precedent to sit for the examination. The policy was to be applied prospectively.

Before the state supreme court as well were the Board's statements of specific actions the Board had taken to exact compliance with Pa.B.A.R. 203 from Petitioner's classmates. Petitioner stipulated by way of brief to the state court that steps were being taken against the delayed diploma applicants and attorneys. (Appendix: A-13)

On the basis of this record, Petitioner's appeal was denied (Appendix: A-14).

Thereafter, the Board was sued in federal court by several delayed diploma attorneys to prevent the Board from pursuing them further. The Board came to believe that just as it had no facilities to evaluate law schools in the first instance, it equally had no facilities to police law schools into compliance with the spirit of the accreditation requirement. Drawing the attention of the practice of George Mason to the ABA, which resulted in the ABA resolution of December 6, 1980 condemning that practice, and to the state supreme court, which resulted in Pa.B.A.R. 203 being amended on December 17, 1981 to specify that the study of law must have been completed at an accredited school, was the best the Board could do. It took no further action.

The conclusion to be drawn from this procedural history and record is that the state supreme court, relying on the Board to undertake to continue its examination of the alleged facts constituting the basis of Petitioner's cause before the Court, denied her petition anticipating further proceedings. While these proceedings never advanced, the Petitioner has never returned to the state supreme court for adjudication of what legal significance, if any, the Board's inaction has. Petitioner

tacitly confesses to this procedural posture at page 13 of her brief when she states the Board never informed the Court further. Simply put, neither has she.

Title 28 U.S.C. §1257 provides that the jurisdiction of this Court is limited to review of *final* judgments rendered. Not a mere technicality, *Montgomery Bldg. & Const. Trades Council v. Ledbetter Erection Co.*, 73 S.Ct. 196, 344 U.S. 178, 97 L.Ed. 204 (Ala. 1952) this law of comity requires that the state judgment be subject to no further review and be an effective determination of the litigation. *Market St. Ry. Co. v. Railroad Commission of State of Cal.*, 65 S.Ct. 770, 324 U.S. 548, 89 L.Ed. 1171, reh. den. 65 S.Ct. 1020, 324 U.S. 890, 89 L.Ed. 1438 (Cal. 1945). A timely petition for rehearing in state court defers finality for purposes of review by this Court until it is acted upon or the power to act has expired, and if rehearing is granted, the judgment is opened. *Market St. Ry. Co. v. Railroad Commission of State of Cal. supra, Andrews v. Virginian R.Co.*, 39 S.Ct. 101, 248 U.S. 272, 63 L.Ed. 236 (Va. 1919). If the state tribunal remands the case contemplating further proceedings, not merely ministerial or for consideration of a collateral disposition upon a judgment already made, the matter is not final. There can be no final determination in any attorney disciplinary proceeding, for example, until such time as it can be shown that the highest court decided the question expressly or by implication through acquiescence to the Disciplinary Board's decision. *American Civil Liberties Union v. Bozardt*, 539 F.2d 340 (4th Cir., 1976), cert. denied 429 U.S. 1022, 97 S.Ct. 639, 50 L.Ed.2d 623 (1976).

Quite clearly, the state supreme court in denying the Petition for Review believed the Board would undertake further proceeding consistent with the Statement of Action filed by the Board upon petition for reconsideration by Petitioner and further believed that Board actions and decisions would perhaps resolve the questions raised by Petitioner.

The posture of this matter in the state court system fits none of the patterns allowing of review by this Court under the pragmatic approach outlined in *Cox Broadcasting Corp. v. Cohn*, 95 S.Ct. 1029, 420 U.S. 469, 43 L.Ed.2d 328 (Ga. 1975), on remand 214 S.E.2d 530, 234 Ga. 67. Nor is there an indication that the state court is attempting to evade this Court's decision. See *Konigsberg v. State Bar of Cal.*, 81 S.Ct. 997, 366 U.S. 36, 6 L.Ed.2d 105 (Cal. 1961), reh. den. 82 S.Ct. 21, 368 U.S. 869, 7 L.Ed.2d 69.

The record shows, viewed in its entirety, that the order of the state supreme court, while on its face denying the Petition for Review, contemplated that the Board would proceed to go behind the accreditation rule to ascertain if the spirit of that rule had been violated by Petitioner's classmates or their school.

The Board, however, became faced with a Gordian knot. The ABA had condemned the practice of delaying diplomas to make it appear as if the graduate had received an ABA approved education, but had not revoked George Mason's provisional accreditation for having engaged in that practice. This left Petitioner's classmates in literal compliance with Pa.B.A.R. 203.

The Board determined finally that just as it could not independently evaluate the quality of legal education, instead having to rely on the ABA accreditation process, it could not undertake to evaluate the accreditation process as it applied to *each* bar applicant to see if the applicant or the applicant's school had managed to circumvent the spirit of that bar rule promulgated to insure the quality of legal education of those serving the public in Pennsylvania. These matters have never been addressed to the state supreme court by the Board or the Petitioner.

II. PETITIONER'S DUE PROCESS AND EQUAL PROTECTION CLAIMS ARE INSUBSTANTIAL AND HAVE BEEN TREATED SIMILARLY BY MANY JURISDICTIONS BOTH FEDERAL AND STATE

The Accreditation Requirement

This Court has rejected constitutional attacks upon the requirement of state bars that their members be graduates of ABA accredited law schools. *Huffman v. Montana Supreme,* F.Supp. 1175 (D. Mont. 1974) (three judge court) affirmed 419 U.S. 955, 95 S.Ct. 216, 42 L.Ed.2d 172 (1974); *Wessel v. Pennsylvania Board of Law Examiners,* 442 U.S. 907, 99 S.Ct. 2817, 61 L.Ed.2d 272 (1979), dismissing appeal for want of a substantial federal question, 327 Misc. Dkt. 21 (Penna. Jan. 4, 1979); *In re Application of Hansen,* 441 U.S. 938, 99 S.Ct. 2154, 60 L.Ed.2d 1040 (1972), dismissing appeal for want of the substantial federal question, 275 N.W.2d 790 (Minn. 1978); see generally, *Hicks v. Miranda,* 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975). [Dismissal for want of substantial federal question is a decision on the merits.] *Hackin v. Lockwood* 361 F.2d 499 (9th Cir. 1966), cert. denied, 385 U.S. 960, 87 S.Ct. 396, 17 L.Ed.2d 305 (1966); *Lombardi v. Tauro,* 470 F.2d 798 (1st Cir. 1972), cert. denied, 412 U.S. 919, 93 S.Ct. 2734, 37 L.Ed.2d 145 (1977); *Moore v. Supreme Court of South Carolina,* 447 F.Supp. 527 (D.S.C. 1977), affirmed, 577 F.2d 735 (4th Cir. 1978), cert. denied 439 U.S. 984, 99 S.Ct. 574, 58 L.Ed.2d 655 (1978); *Donnelly v. Boston College,* 558 F.2d 639 (1st Cir.) (per curiam), cert. denied, 434 U.S. 987, 98 S.Ct. 618, 54 L.Ed.2d 483 (1977). Other precedent from which review was not sought but which upholds the accreditation requirement include *inter alia*: *Shenfield v. Prather,* 387 F.Supp. 676 (N.D. Miss. 1974) (three judge court); *Potter v. New Jersey Supreme Court,* 403 F.Supp. 1036 (D.N.J. 1975), affirmed Mem. 546 F.2d 418 (3rd Cir. 1976); *Murphy v. Egan,* 498 F.Supp. 240 (E.D. Pa. 1980); *Murphy v. State*

Board of Law Examiners, 429 F.Supp. 16 (E.D. Pa. 1977); *Ostroff v. New Jersey Supreme Court*, 415 F.Supp. 326 (D.N.J. 1976); *Hickey v. District of Columbia Court of Appeals*, 457 F.Supp. 584 (D.D.C. 1978); *Pappanastos v. Board of Trustees, etc.*, 615 F.2d 219 (5th Cir. 1980); *Harris v. Louisiana State Supreme Court*, 334 F.Supp. 1289 (E.D. La. 1971).

The Irrebuttable Presumption Argument

Firstly, two three-judge district courts have held that ABA law school requirements such as those established by Pa. B.A.R. do not violate due process because they do not create "irrebuttable presumptions" but rather operate as "conditions precedent" to admission to the bar. *Ostroff v. New Jersey Supreme Court*, supra; *Potter v. New Jersey Supreme Court*, supra. So also in the case of *Moore v. Supreme Court of South Carolina* supra, the court, in treating an identical state bar rule of South Carolina's as an irrebuttable presumption, found such a presumption not of the type which could justifiably be subjected to strict scrutiny and accordingly found that the rule was constitutional under the due process clause without the state having to prove a compelling state interest. While the court found no case precisely holding irrebuttable presumptions established by educational requirements for professionals exempt from strict scrutiny, it did find one case which contained language in dicta to this effect, specifically, *Berger v. Board of Psychologists Examiners*, 521 F.2d 1056 (D.C. Cir. 1975).

Non-Delegation Arguments

It is clear that the resources of the Supreme Court of Pennsylvania and its Board of Law Examiners are neither sufficient nor suited to the task of "accrediting any particular law school" let alone the over 170 approved law schools in this country. *Appeal of Murphy*, 482 Pa.

43, 393 A.2d 369 (1978), appeal dismissed and cert. denied sub. nom.; *Murphy v. Pennsylvania State Board of Bar Examiners*, 440 U.S. 901, 99 S.Ct. 1204, 59 L.Ed.2d 449 (1979). It is for these reasons that courts have found unmeritorious claims that states may not delegate the job of evaluating legal education to the ABA. *Rossiter v. Colorado Board of Law Examiners*, C-4767 (D.Col., filed Aug. 26, 1975 — three judge court), appeal dismissed (by three judge court under U.S. Supreme Court Rule 14(2), D.Colo. Jan. 20, 1977), slip op. at 4-8; *Lombardi v. Tauro, supra; Potter v. New Jersey Supreme Court, supra; Kadans v. Collins* 441 F.2d 657 (9th Cir. 1971), appeal dismissed 404 U.S. 1007, 92 S.Ct., 672, 30 L.Ed.2d 656 (1972); *Hackin v. Lockwood, supra; In re Lorring*, 75 Nev. 330, 340 P.2d 589 (1959); *Rosenthal v. State Bar Examining Committee*, 116 Conn. 409, 165 A.211 (933); *Appeal of Murphy*, 482 Pa. 43, 393 A.2d 369 (1978), appeal dismissed and cert. denied sub. nom.; *Murphy v. Pennsylvania State Board of Bar Examiners*, supra.

Due Process

Cases such as *Wilner v. Committee of Character and Fitness*, 377 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963) and *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1975), which Petitioner cites for the proposition that procedural due process extends to the "bar candidate" are distinguishable from the instant case in that those cases concerned allegations of moral unfitness directed personally to individual candidates, while this case involves a challenge to the imposition of general prerequisites to admission.

Petitioner's reliance on the practice of New York to grant waivers of the accreditation requirement where the applicant has demonstrated that his or her attendance and receipt of a diploma from an unapproved law school occurred within three years of the subsequent approval of the law school is ill-founded. The principle

upon which such waivers have been granted in New York has been that the eventual approval of law school is necessarily predicated on its performance in the years *immediately preceding* formal accreditation. Petitioner, even were she in New York, could not rely on such a rule because she graduated in August, 1977, and accreditation occurred August of 1980. Therefore, she did not attend school within three years of accreditation. It is, therefore, hardly the case that petitioner graduated from a law school where accreditation was granted "shortly" after Petitioner completed her studies as Petitioner would have this Court believe. [Petitioner's Brief: p. 18]

Petitioner appears to argue that it is a violation of due process if Pa.B.A.R. 203, requiring that a bar applicant have graduated from an accredited law school, is applied without grandfathering in all those who graduated from law schools that became accredited three years after they completed course work. As has previously been observed, Petitioner would not benefit from such a clause, because she did not complete her course work within three years of the time the law school was finally accredited. She finished in August of 1977 and the law school was accredited in August of 1980. Therefore, even if one were to presume, as New York is willing to do, that the quality of education provided a law student was the same within three years before accreditation as it was on the date of accreditation, Petitioner's education would not benefit from that presumption.

The ABA itself does not consider its accreditation to carry with it a grandfather clause making accreditation retroactive for a three year period. An examination of the resolution of December 6, 1980 (Appendix: A-3) shows that the ABA considers only that June graduates of a school which receives ABA approval in August to be graduates of an ABA approved law school. According to the ABA, the reason for this decision is that the action of the House of Delegates is based upon a recommendation of the Section of Legal Education and Admissions to the

Bar which in turn is based on the report of inspection conducted of the school during the spring semester, so that essentially the school is found to be in substantial compliance with the ABA's standards prior to the June graduation date. The resolution of December 6 is directed to instances in which the applicant could reasonably be deemed to have completed his or her legal studies prior to the time an inspection of the school found the school to be in substantial compliance with the ABA standards. It cannot be said that Petitioner benefits from the December 6 resolution.

Just as the Board does not have the facilities to examine a law school in the first instance, it does not have the facilities to ascertain whether the law school was in substantial compliance with accreditation requirements prior to the accreditation. Petitioner is in effect, trying to get the Board to accredit her law school prior to the time the ABA accredited the law school. The precedent of this ad hoc proceeding would place an intolerable burden on the states' supreme courts, would yield results far less reliable than those of the ABA and would invite challenges to the quality of such ad hoc determinations in endless variety.

In the case of *Murphy v. Egan*, 498 F. Supp. 240 (E.D. Pa. 1980), Judge Charles R. Weiner of the Third Circuit Court of Appeals found that the "waiver practice" which permitted some graduates of non-ABA approved law school to sit for the Pennsylvania bar to be unconstitutional, and as a result on April 25, 1980, the Pennsylvania Supreme Court amended Pa.B.A.R. 203(2) to read that the accreditation requirement is applicable *without exception*. Petitioner appears to claim that it is a violation of due process if the amendment to Pa.B.A.R. Rule 203 does not include a "grandfather clause" which would permit Petitioner to attempt to benefit from the waiver practice which the federal court declared unconstitutional.

Firstly, abolition of an unconstitutional practice cannot deprive Petitioner of due process. Secondly, the

waiver in Pennsylvania was solely a matter of grace, and Petitioner would not have attended law school in the belief that she would benefit from that grace. She did, however, attend law school knowing full well that she must graduate from an accredited law school. With respect to the former waiver procedure which has now been abolished in Pennsylvania, there were no standards promulgated to be followed in the waiver procedure. Petitioner could not have attended law school and conducted herself in a manner consistent with standards that did not exist. The abolition of waiver did not result in the creation of a new requirement being imposed on bar applicants. Therefore, *Berger v. Board of Psychologists Examiners, supra; Louis v. Supreme Court of Nevada* 490 F. Supp. 1174 (D. Nev. 1980); see also *Potter v. New Jersey Supreme Court, supra,* at 1039, are inapposite. As was said in *Louis v. Supreme Court of Nevada, supra,* at 1184:

> One who attends an unaccredited law school knowing it may preclude her admission to practice in the state of her choice cannot complain when she is excluded from practice for that reason. *Yetka, J. dissent in Application of Hansen*, 275 N.W. 2d 790 (Minn. 1978).

Equal Protection

This Court in *Tigner v. Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940) stated that:

> The Fourteenth Amendment enjoins "the equal protection of the laws," and laws are not abstract propositions. They do not relate to abstract units A, B and C but are expressions of policy arising out of specific difficulties addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.

In the case of *Aronson v. Ambrose* 366 F. Supp. 37 (D. Virgin Islands 1972), the plaintiffs challenged the bar examination rule that required an intention of applicants to reside and practice law in that jurisdiction on a full-time basis. They claimed an illegal distinction was drawn between those who could and those who could not prove that they intended to reside in the Virgin Islands and to practice law there after being admitted to the bar. Plaintiffs did not suggest that distinctions, indeed discrimination, are per se unconstitutional under the equal protection laws. Plaintiffs there realized that rough accommodations are not violative of equal protection unless they are hostile and invidious. They, therefore, attempted to show the rule they were challenging created an irrational or invidious classification and necessarily that distinctions between residents and nonresidents in the practice of law were without rational foundation. They relied principally on the charge that they, the plaintiffs, might easily have falsified their applications to allege an intent to reside in the jurisdiction in which they wanted to practice law and by reason of the ease with which this rule might thus be circumvented, plaintiffs should be rewarded for their honesty with admission to the bar. The court, however, on the basis of this argument observed that the rationality of a decision that resident attorneys can more thoroughly perform the duties of their office than could their nonresident counterparts is not in any way dependent on the ease or difficulty of implementing such a decision.* Petitioner's arguments are no more meritorious.

Petitioner suggests that because she graduated when she completed her course work and others in her class delayed in receiving their diplomas for three years until the school they attended was finally accredited, that she should be rewarded for her "honesty" by admis-

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*"The court found plaintiffs' argument to reflect unflattering light on the suggestion that the distinction was irrational.

sion to the bar. As this Court explained in *Metropolis Theater Company v. Chicago*, 228 U.S. 61, 69-70, 33 S.Ct. 441, 43, 57 L.Ed. 730 (1913):

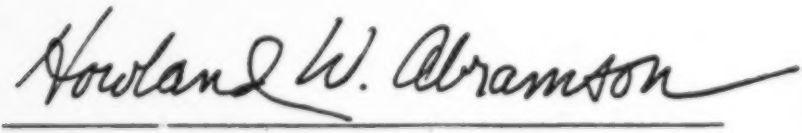
> The problems of government are practical ones and may justify if they do not require, rough accommodations — illogical, it may be, and unscientific . . . . . what is best is not always discernible; the wisdom of any choice may be disputed or condemned.

The bar requirement of accreditation is beyond any doubt rational. And the reason for its very existence is the same reason that the Board is unable to go behind it. As a practical matter, the Board must rely on the ABA. Just as it must rely on the ABA to advise of the event of accreditation, it must rely on the ABA to make certain that accreditation is not attained through artifice. Further, it must rely on the ABA to make certain that the accreditation is not used by the school or the bar applicant to create a false impression that the standards have been met.

While just as in *Aronson v. Ambrose, supra*, where the plaintiffs could have falsified their applications to allege an intent to reside in the jurisdiction in which they wanted to practice law, Petitioner here could just as easily have joined her classmates and held her breath until the school she attended got accreditation before receiving her diploma. The fact that she did not or that her classmates did does not create a circumstance whereby she has been denied equal protection of the law by the Commonwealth of Pennsylvania.

CONCLUSION

There being no special and important reasons which imply a reach to a problem beyond the academic or the episodic, and there being no case involving principles the settlement of which is of importance to the public as distinguished from the parties, the Board of Law Examiners respectfully submits that the Petition for Writ of Certiorari be denied.



Howland W. Abramson, Esquire
Charles W. Johns, Esquire
1414 Three Penn Center Plaza
Philadelphia, Pa. 19102
Legal Counsel to the Administrator
of Pennsylvania Courts
Attorneys for Pennsylvania
Board of Law Examiners

Appendix

PENNSYLVANIA BOARD OF LAW EXAMINERS

MEMBERS OF BOARD
DESMOND J. MCTIGHE, CHAIRMAN
JUSTIN M. JOHNSON, VICE CHAIRMAN
JOHN W. ENGLISH, SR.
ANTHONY S. MINISI
JAMES W. SCANLON

Public Ledger Building
Independence Square
Philadelphia, Pa. 19106
(215) 627-3246

SUSAN L. ANDERSON
SECRETARY AND TREASURER

January 13, 1981

STATEMENT OF THE ACTION OF THE PENNSYLVANIA BOARD OF LAW EXAMINERS

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA

In the Matter of the Appeal of Esther Kirshenbaum From the Decision of the Pennsylvania Board of Law Examiners No. _____ Miscellaneous Docket No. _____

On October 2, 1980, Esther Kirshenbaum filed an application with the Pennsylvania Board of Law Examiners for enrollment in the February, 1981 bar examination under Pa. B.A.R. 203.

On October 24, 1980, the Board denied her petition because Ms. Kirshenbaum did not meet the educational requirements of Pa. B.A.R. 203 (2) in that she did not graduate from a law school accredited by the American Bar Association.

The applicant's record reveals that she pursued her law study at International School of Law, Arlington, Virginia, from September, 1974 to August, 1977 and received a J.D. degree in August, 1977. This law school had not been accredited by the American Bar Association.

In August, 1980 the American Bar Association at its annual meeting granted provisional approval to George Mason University, the successor school of International School of Law.

Accordingly, therefore, we respectfully request and recommend that this appeal be denied.

Respectfully submitted,

SUSAN L. ANDERSON
Secretary

AMERICAN BAR ASSOCIATION

December 16, 1980

Susan L. Anderson, Secretary
Pennsylvania Board of Law Examiners
2010 Two Girard Plaza
Philadelphia, Pennsylvania 19102

Dear Ms. Anderson:

At its December 6th, 1980 meeting, the Council of the Section of Legal Education and Admissions to the Bar had before it inquiries from several state bar admitting authorities as to whether the Council had adopted a position concerning individuals who complete their studies at an unapproved law school, but postpone graduation, or the issuance of a diploma or degree, until after the school has received ABA provisional approval.

The Council adopted the following resolution:

WHEREAS, most state supreme courts require graduation from an ABA-approved law school as a requisite for bar admission in order to assure the public that persons representing them in legal matters have received a quality legal education, and

WHEREAS, some individuals begin and complete substantially all of their legal education at an unapproved law school, which law school has been inspected for possible ABA provisional approval, but is found not to meet the ABA Standards during the time of such attendance; and these individuals may then delay their formal graduation until after the law school received ABA provisional approval, and

WHEREAS, some law schools receiving ABA provisional approval have permitted students to delay their graduation until such approval was received by the school and have then awarded degrees dated

subsequent to receipt of ABA provisional approval to such students,

THEREFORE, the Council of the Section of Legal Education and Admissions to the Bar adopts a policy disapproving this practice and requests that all law schools seeking provisional approval, all provisionally approved law schools, all law school inspectors and all state bar admitting authorities be notified of this policy.

Please note that the Council's policy is not directed to the decision of bar admitting authorities to consider June graduates of a school which receives ABA approval in August to be graduates of an ABA-approved law school. The reason for such decision is that the action of the House of Delegates in August is based upon a recommendation of the Section of Legal Education and Admissions to the Bar which in turn is based upon the report of an inspection conducted of the school during the Spring semester, so that essentially the school was found to be in substantial compliance with the ABA Standards prior to the June graduation. Rather, the Council's policy is directed to instances in which the applicant could reasonably be deemed to have completed his or her legal studies prior to the time an inspection of the school found the school to be in substantial compliance with the ABA Standards.

Sincerely yours,

Frederick R. Franklin

PENNSYLVANIA BOARD OF LAW EXAMINERS
Public Ledger Building
Independence Square
Philadelphia, PA 19106
(215) 627-3246

DESMOND J. McTIGHE, Chairman
JUSTIN M. JOHNSON, Vice Chairman
JOHN W. ENGLISH, SR.
ANTHONY S. MINISI
JAMES W. SCANLON

SUSAN L. ANDERSON
Secretary/Treasurer

June 17, 1981

STATEMENT OF THE ACTION OF THE PENNSYLVANIA BOARD OF LAW EXAMINERS

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA

In the Matter of the Appeal of Esther Kirshenbaum from the Decision of the Pennsylvania Board of Law Examiners No. _____ Miscellaneous Docket No. _____

On October 2, 1980, Esther Kirshenbaum filed an application with the Pennsylvania Board of Law Examiners for permission to sit for the February, 1981 bar examination under Pa. B.A.R. 203.

On October 24, 1980, the Board denied her petition because Ms. Kirshenbaum did not meet the educational requirements of Pa. B.A.R. 203(2) in that she did not graduate from a law school accredited by the American Bar Association.

The record reveals that Ms. Kirshenbaum pursued her legal education at International School of Law, Arlington, Virginia, from September, 1974 to August, 1977 and received her Juris Doctor degree in August, 1977. At that time, the school was not accredited by the American Bar Association.

Sometime in 1978, International School of Law merged with the George Mason University and in August, 1980 the American Bar Association granted provisional accreditation to the George Mason University School of Law.

At that time, the Board received numerous applications from graduates of George Mason whose official transcripts indicated that their graduation date was August 23, 1980. In some instances the transcripts revealed that the course requirements for obtaining the Juris Doctor degree were all or substantially completed *well before the actual granting of the degree by George Mason*. As Pa. B.A.R. 203(2) requires that an applicant must have received an earned Juris Doctor degree from an A.B.A. approved school and since these George Mason applicants did have a degree from an A.B.A. approved school, the Board approved their applications.

Ms. Kirshenbaum has argued that she is no different from some of the other George Mason graduates who were permitted to sit for the Pennsylvania bar examination. Her position is that their education is identical to hers and the only difference between them is the fact that they deliberately withheld receiving their degrees until George Mason was accredited.

In an effort to inform the Supreme Court of the actions taken by the Pennsylvania Board of Law Examiners and the arguments of Ms. Kirshenbaum, Ms. Kirshenbaum's lawyer, Jeffrey I. Pasek, and Susan L. Anderson, Secretary of the Board, met with Justice Robert N. C. Nix. Justice Nix expressed the belief that those George Mason graduates who delayed the granting of their degrees, did so in conjunction with their law school to deliberately avoid the requirements of the Pennsylvania rule by giving the Board the impression that their legal education was, in fact, ABA approved.

As a result of that meeting, the Pennsylvania Board of Law Examiners has taken the following actions with regard to those George Mason graduates.

1. Any applicant for the Pennsylvania bar examination, whether a first-timer or a repeater, has been informed that he or she will not be permitted to sit in Pennsylvania unless or until the Board is convinced that there was a legitimate reason for the delay between the course completion and the degree granting.

2. Any individual who has already been admitted to the Bar has been informed that he or she will have to convince the Board that there is a legitimate reason for the delay between the course completion and the degree granting or a petition will be filed with your Honorable Court recommending that the admission be revoked.

Ms. Kirshenbaum graduated from an unapproved law school and, therefore, does not meet the requirements of Pa. B.A.R. 203 (2). Any argument that she has not been treated equally with other George Mason graduates has now become moot by the Board's actions. According, therefore, the Board respectfully requests and recommends that this Petition for Reconsideration be denied.

Respectfully submitted,

/s/SUSAN L. ANDERSON
Secretary

PENNSYLVANIA BOARD OF LAW EXAMINERS

MEMBERS OF BOARD
DESMOND J. MCTIGHE, CHAIRMAN
JUSTIN M. JOHNSON, VICE CHAIRMAN
JOHN W. ENGLISH, SR.
ANTHONY S. MINISI
JAMES W. SCANLON

Public Ledger Building
Independence Square
Philadelphia, Pa. 19106
(215) 627-3246

SUSAN L. ANDERSON
SECRETARY AND TREASURER

June 17, 1981

Mr. Michael Ronald Kostelansky
210 Beechwood Drive, Laflin
Wilkes-Barre, Pa. 19802

Dear Mr. Kostelansky:

After George Mason University School of Law was granted provisional accreditation in August, 1980, this office received numerous applications from graduates of George Mason whose official transcripts indicated that their graduation date was August 23, 1980. In your particular situation, the course requirements for obtaining your J.D. degree were all or substantially completed well before the granting of your degree by George Mason. Pa. B.A.R. 203 (2) requires that an applicant for admission to the Bar of the Commonwealth of Pennsylvania must have received an earned Juris Doctor degree from an ABA approved school. Based on its belief that the requirements of Pa. B.A.R. 203 (2) had been met, the Pennsylvania Board of Law Examiners approved your application.

Recently, the Pennsylvania Supreme Court had an opportunity to review the applications of George Mason graduates. The Court feels that George Mason students, in conjunction with the school, took steps to avoid the requirements of the Pennsylvania rule by giving the

Board the impression that their legal education was, in fact, ABA approved.

Consequently, pursuant to the Court's instructions, you are hereby notified that unless you are able to convince the Board that there was a legitimate reason for the delay between your course completion and the granting of your degree, the Board will have no alternative but to file a petition with the Supreme Court of Pennsylvania recommending that your admission to the Bar be revoked.

If you would like to present written evidence on your behalf, I will see that it is presented to the Board at its next meeting. If you would like a hearing before the Board, please so notify the office in writing and a date will be scheduled. If you would like to discuss this matter with me, I can be reached at (215) 627-5556.

Very truly yours,

SUSAN L. ANDERSON
Secretary

LETTER #1

PENNSYLVANIA BOARD OF LAW EXAMINERS

MEMBERS OF BOARD
DESMOND J. MCTIGHE, CHAIRMAN
JUSTIN M. JOHNSON, VICE CHAIRMAN
JOHN W. ENGLISH, SR.
ANTHONY S. MINISI
JAMES W. SCANLON

Public Ledger Building
Independence Square
Philadelphia, Pa. 19106
(215) 627-3246

SUSAN L. ANDERSON
SECRETARY AND TREASURER

June 17, 1981

Mr. Jeffrey Harris Frankel
421 Meadowbrook Drive
Huntingdon Valley, Pa. 19006

Dear Mr. Frankel:

After George Mason University School of Law was granted provisional accreditation in August, 1980, this office received numerous applications from graduates of George Mason whose official transcripts indicated that their graduation date was August 23, 1980. In your particular situation, the course requirements for obtaining your J.D. degree were all or substantially completed well before the granting of your degree by George Mason. Pa. B.A.R. 203(2) requires that an applicant for admission to the Bar of the Commonwealth of Pennsylvania must have received an earned Juris Doctor degree from an ABA approved school. Based on its belief that the requirements of Pa. B.A.R. 203(2) had been met, the Pennsylvania Board of Law Examiners approved your application.

Recently, the Pennsylvania Supreme Court had an opportunity to review the applications of George Mason graduates. The Court feels that George Mason students, in conjunction with the school, took steps to avoid the requirements of the Pennsylvania rule by giving the Board the impression that their legal education was, in fact, ABA approved.

Consequently, pursuant to the Court's instructions, you are hereby notified that you will not be permitted to sit for the July, 1981 bar examination or any other Pennsylvania bar examination unless and until you are able to convince the Board that there was a legitimate reason for the delay between your course completion and the granting of your degree.

If you would like to present written evidence on your behalf, I will see that it is presented to the Board at its next meeting. If you would like a hearing before the Board, please so notify the office in writing and a date will be scheduled. If you would like to discuss this matter with me, I can be reached at (215) 627-5556.

Very truly yours,

SUSAN L. ANDERSON
Secretary

LETTER #2

SUPREME COURT OF PENNSYLVANIA
Eastern District

CARL RICE, ESQ.
Prothonotary
CATHERINE E. LYDEN
Deputy Prothonotary

456 City Hall
Philadelphia 19107
(215) 686-3581-84

March 16, 1981

Jeffrey Ivan Pasek, Esquire
22nd Floor, PSFS Building
Philadelphia, PA 19107

RE: In the Matter of the Appeal of Esther Kirshenbaum From the Decision of the Pennsylvania Board of Law Examiners Petition of: Esther Kirshenbaum *No. 25 E.D. Misc. Dkt. 1981*

Dear Mr. Pasek:

This is to advise you that the following Order has been endorsed on your Petition for Reconsideration, filed in the above-captioned matter:

"March 11, 1981
Petition GRANTED.
s/ HENRY X. O'BRIEN,
Chief Justice."

In the Supreme Court of Pennsylvania
No. 25 E.D.
Misc. Docket 1981

In the Matter of the Appeal of Esther Kirshenbaum from the Decision of the Pennsylvania Board of Law Examiners

• • • •

All of the 16 individuals described above began law school at the International School of Law. Those persons whose last semester was prior to 1978 completed their law school course work prior to the merger of the International School of Law into George Mason University. At least 13 of these 16 persons completed all of their legal studies before Mason was accredited by The ABA.

After this appeal was filed, the Board notified those Mason graduates who have not yet taken the Bar examination that they would have to convince the Board that there was a legitimate reason for delay between course completion and graduation before being allowed to sit for the Pennsylvania Bar Examination. The Board has also informed those Mason graduates who have already been admitted to the Bar that they would similarly have to convince the Board or a petition would be filed with this Court recommending that their admissions be revoked.

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SUPREME COURT OF PENNSYLVANIA
Eastern District

CARL RICE, ESQ.
Prothonotary

468 City Hall
Philadelphia 19107
(215) 686-3581-84

September 16, 1981

Ms. Esther Kirshenbaum
208 E. Mt. Airy Avenue
Philadelphia, PA 19119

Jeffrey Ivan Pasek,
Esquire
22nd Floor, PSFS Bldg.
Philadelphia, PA 19107

RE: In the Matter of the Appeal of
Esther Kirshenbaum etc.
No. 25 E.D. Misc. Docket 1981

Dear Ms. Kirshenbaum and Mr. Pasek:

This is to advise you that the following Order has been endorsed on the Petition for Review, filed in the above-captioned matter:

"September 11, 1981
Upon Reconsideration, Petition Denied. Per curiam. Mr. Justice Larsen and Mr. Justice Flaherty would grant.

Very truly yours,

s/ Carl Rice, Esquire
Prothonotary

CR:ltl

cc: Susan L. Anderson, Esquire
Secretary — PBLE